



Memorandum

TO: PLANNING COMMISSION

FROM: Stephen M. Haase, AICP

**SUBJECT: PROTEST OF A MITIGATED
NEGATIVE DECLARATION
FOR GENERAL PLAN
AMENDMENT FILE NO.
GP02-07-05**

DATE: November 8, 2002

COUNCIL DISTRICT: 7

RECOMMENDATION

Staff recommends that the Planning Commission uphold the Mitigated Negative Declaration prepared for this General Plan amendment.

BACKGROUND

This is a protest of a Mitigated Negative Declaration (MND) prepared for a General Plan amendment to change the General Plan Land Use/Transportation Diagram designation from Medium High Density Residential (12-25 DU/AC) (8.6 acres) and Public Park/Open Space (13.1 acres) to High Density Residential (25-50 DU/AC) (5.0 acres) and Public Park/Open Space (16.7 acres) on a 21.7-acre site, located on the easterly side of Senter Road, approximately 600 feet southerly of Needles Drive.

The Draft Mitigated Negative Declaration was circulated on July 22, 2002 to property owners/occupants within 1,000 feet of the project site. It was also posted for 20 days with the County Clerk and on the Department's website. A formal protest challenging the adequacy of the Mitigated Negative Declaration was filed in the Department of Planning, Building and Code Enforcement on August 8, 2002. Based on the Initial Study and a comprehensive review of the issues raised in the protest letter, the Director of Planning, Building and Code Enforcement adopted the Negative Declaration on September 9, 2002.

ANALYSIS

The Draft Mitigated Negative Declaration for this project was prepared in conformance with the California Environmental Quality Act (CEQA). Section 21080 of the CEQA Statute and Section 15070, sub. (b.1) of the Guidelines specify that a public agency shall prepare a Mitigated Negative Declaration for a project subject to CEQA when an initial study identifies potentially significant environmental effects but, measures included in the project would avoid the adverse effects or mitigate the effects to a point where clearly no significant effect would occur. The

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Initial Study prepared for this project examined the potential for the project to result in significant environmental impacts and concluded that the project would not result in a significant environmental impact that would require the preparation of an Environmental Impact Report (EIR). Using the "Fair Argument" standard, an EIR is required if it can be fairly argued, based on substantial evidence in the record, that a project will have a significant effect on the environment.

The proposed High Density Residential (25-50 DU/AC) designation on the subject amendment site is not the most appropriate land use given the existing and planned industrial uses surrounding three sides of the site. Although planning staff is not in support of a high-density residential development at this particular location, staff is confident that it is possible to design a residential project on a site of this size in a way that would avoid significant environmental impacts from the surrounding uses, as concluded in the referenced Initial Study and Mitigated Negative Declaration.

The City of San Jose received one letter of protest on the Draft Mitigated Negative Declaration. The protest letter raises issues regarding potential effects from a high-density residential project on the subject site in regards to its impact on the future economic viability of the surrounding area's existing and future industrial uses. Although the appellant raises several points as to potential effects on the viability of the surrounding industrial area; these economic effects would not be considered an environmentally significant impact because they are not directly related to physical changes in the environment. The City's responses to specific issues identified in the letter are addressed on the following pages. In addition, a complete copy of the protest letter is attached.

RESPONSE TO COMMENTS RECEIVED FROM MATTEONI, SAXE & O'LAUGHLIN, RECEIVED AUGUST 8, 2002

COMMENT 1.

The Property is located on Senter Road, at the edge of the exclusively industrial area known as the Monterey Corridor. The parcel immediately to the north on the same side of Senter Road is designated Industrial Park (IP). Uses allowed under the City's IP zoning designation include light manufacturing, private power generation, photo processing and developing, recycling processing and transfer facilities, common carrier depots, and utility facilities (SJMC Section 20.50.100, Table 20-110).

RESPONSE TO COMMENT 1.

The appellant is correct in stating that the subject site is located adjacent to the designated Monterey Corridor Redevelopment Project Area. The Monterey Corridor Redevelopment Project Area is identified by the General Plan as an older industrial area which provides lower cost land and buildings necessary for industrial users which will fuel future job growth and should be preserved for future industrial users.

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The appellant is accurate in identifying the uses allowed under the Industrial Park Zoning District; however, the uses listed, with the exception of light manufacturing and photo processing and development, are not permitted by right in the zoning district, but would require the approval of a Conditional Use Permit prior to any development or use to operate on the subject site. A Conditional Use Permit is required for uses that may not be appropriate at every location within the Zoning District or which may require special conditions to ensure that the use does not have negative effects on surrounding properties.

COMMENT 2.

The land on the south side of subject Property is designated Light Industrial (LI). Earlier this year the City Council approved a General Plan change for that property from Industrial Park with a Mixed Industrial Overlay. Your staff report acknowledges that this change was to “better reflect the existing uses and preserve the area exclusively for industrial uses.” The Mitigated Negative Declaration does not reflect this changed designation.

RESPONSE TO COMMENT 2.

The Initial Study characterizes the amendment site as surrounded by office and industrial uses. The appellant is correct in that, during the 2002 Spring General Plan Hearing, a General Plan amendment was approved to change the land use designation from Industrial Park with Mixed Industrial Overlay to Light Industrial and which removed the Mixed Industrial Overlay to the south of the amendment site. That General Plan amendment was proposed by staff in order to reflect the existing industrial uses. The Initial Study evaluated the proposed land use in the context of the surrounding industrial uses.

The environmental conditions existing at the time a project is considered, under the requirements of the California Environmental Quality Act (CEQA), are to be the baseline environmental conditions to which the environmental impacts of the proposed project(s) are compared. The Initial Study accurately describes the surrounding industrial uses and environmental setting.

COMMENT 3.

Uses allowed under the City’s LI zoning designation include those uses above [see comment 1.] for the IP zone and well as the following more intense uses: industrial services, lab processing, medium manufacturing, construction/corporation yards, hazardous materials storage, electrical power generation facilities and sales/leasing of commercial vehicles and construction equipment. As to existing uses, Airtronics Metal Specialties, at 1980 Senter Road, operates a large machine shop with multiple shifts and busy loading docks, with loading traffic typically occurring as early as 5:00 a.m....

The use of toxic materials is, of course, an everyday occurrence in industrial areas. Current and future users of the land on three sides of the Property do and will use toxics. Accidents happen with those toxic chemicals no matter how diligent the efforts to avoid them. For example, in January of 1986, there was a diesel spill across Senter Road from the property.

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Contaminated soil had to be excavated. The proposed High Density Residential site is down-gradient from the site of that spill (sitting the Heavy Industrial land and Coyote Creek), and hence a similar accident after the construction of the residences would undeniably have an adverse impact on those residents.

RESPONSE TO COMMENT 3.

The Light Industrial land use designation excludes any uses with unmitigable hazardous or nuisance effects. Uses identified above, such as construction/corporate yards, hazardous materials storage, electrical power generation facilities and the sale/leasing of commercial vehicles, would require the approval of a Conditional Use Permit prior to possible development and operation of such a use. Future development of adjacent industrial properties would be subject to the City of San Jose development standards identified in the City Council adopted Zoning Ordinance and Design Guidelines.

In addition, a Phase I Environmental Assessment was conducted for the proposed General Plan amendment. All state and federal database records concerning regulated hazardous waste facilities were reviewed as part of the Phase I Study. The conclusion of the study found that the subject site is not noted as active on any of the agency lists researched and therefore, no further investigations are warranted at this time. At the point a residential development proposal is filed with the City, further environmental analysis and a Phase II Study would be required.

The appellant states that a toxic spill “accident” could occur from the surrounding industrial uses which would result in a significant impact on future residents of the subject site. Users and handlers of hazardous materials are required to meet all Federal, State and local hazardous materials regulations and standards to avoid exposing the community to toxic materials. Theorizing on the likelihood of future accidents is speculative and cannot be quantified. Such speculation does not constitute a significant environmental impact under CEQA.

COMMENT 4 (B. APPLICABLE REGULATIONS)

It is a fundamental tenet of sound municipal planning that residential uses should be separated from industrial uses. This need for a buffer becomes greater as the intensity of the industrial use increases from industrial park uses to heavy industrial use. The rationale underlying this separation is self-evident; the noise, traffic and hazardous material usage, which characterize industrial areas, are incompatible with residential use.

These concepts of sound planning are strongly reflected in the City of San Jose’s planning documents...

RESPONSE TO COMMENT 4 (B. APPLICABLE REGULATIONS)

Staff agrees with the appellant that a high density residential development is not the most appropriate land use for the subject site given its location in an industrial area. However, from a CEQA perspective, staff is confident that it is possible to design a residential project on a site of this size that would avoid significant environmental impacts from, or upon, surrounding industrial uses.

COMMENT 5

See attached Protest Letter paragraph 4, page 3 through page 5.

RESPONSE TO COMMENT 5

The appellant's comment lists several General Plan Goals and Policies associated with industrial and residential land use, the City's economic development goals and the development and performance standards identified within the Zoning Ordinance which may be relevant to the proposed land use designation. The current land use designation of the site is Medium High Density Residential (12-25 DU/AC) and Public Park/Open Space. Therefore, the proposed land use amendment does not result in the conversion of industrially designated land and would not be wholly inconsistent with the aforementioned General Plan goals and policies.

Although staff feels that the proposed land use designation may not be the most appropriate land use for the site, this issue does not constitute a significant unavoidable environmental impact. CEQA states that the focus of analysis in the environmental review shall be on the anticipated physical changes to the environment as a result of the project. The appellant has not submitted substantial evidence to identify or quantify what environmental impacts would be expected to occur on the surrounding properties from the proposed General Plan amendment.

COMMENT 6

In addition to these City provisions which reflect the potential significant effects of placing residential uses adjacent to industrial use, state and federal law imposes requirements on industrial users when located in the vicinity of a residential use. These are completely ignored by the Mitigated Negative Declaration. For example, users of regulated hazardous substances are required to prepare and implement a risk management plan, the required components of which are provided by Federal law. In California, RMP's are required to give consideration "to the proximity of the facility or proposed facility to populations located in ...residential areas..." (Health and Safety Code Section 25534.1).

RESPONSE TO COMMENT 6

The portion of the subject site along Senter Road currently designated for Public Park/Open Space uses is located approximately 500 feet south of an existing residential development.

Therefore, sensitive receptors are already located in close proximity to this industrial area. The Initial Study prepared for the proposed amendment analyzed the potential for significant impacts on the environment resulting from the proposed amendment. The fact that industrial users located adjacent to residential uses may be required to prepare and implement risk management plans does not constitute a significant environmental impact under CEQA. Therefore, the conclusion of the Initial Study that the proposed project would result in a less than significant environmental impact with mitigation incorporated is warranted and the preparation of an EIR is not required.

COMMENT 7

The regulation of toxic materials is especially severe when the use is occurring in the vicinity of "sensitive receptors". The Bay Area Air Quality Management District has recognized that children are among the members of the population most sensitive to the effects of air pollution and toxic materials, i.e., sensitive receptors. The proposed General Plan Amendment would result in children residing in a location surrounded on three sides by industrial uses, with the attendant risk of toxic release.

RESPONSE TO COMMENT 7

As indicated in Response to Comment 6 above, sensitive residential uses are already located within the project area. Local and regional laws, policies and ordinances regarding the handling and storage of toxic materials are strictly enforced in San Jose in order to ensure not only a safe environment for the employees of such an operation but also to ensure the safety and welfare of the surrounding community. Industrial users in the City of San Jose are expected to operate in full conformance with all applicable laws and regulations regarding toxic or hazardous materials in order to avoid or reduce potential adverse impacts associated with the community's exposure to hazardous materials. The Initial Study concludes that the proposed General Plan amendments would not result in a significant environmental impact. Therefore, the preparation of an EIR is not warranted.

COMMENT 8

When an incompatible use is permitted to be located in an industrial zone, the result is the corruption of that zone. Intense industrial uses, which would normally be allowed to occur, are either precluded or subjected to greater regulation due to the proximity of the existing incompatible use.

RESPONSE TO COMMENT 8

Introducing a high-density residential development into an established industrial area could likely result in precluding some more intensive industrial uses from operating adjacent to the new residential development. Although more stringent performance standards could be required for new industrial uses locating adjacent to, or in close proximity to, the proposed residential site, this restriction does not constitute a significant unavoidable environmental impact because there

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is no evidence that it is directly related to physical changes in the environment. Since the proposed project would result in a less than significant environmental impact with mitigation incorporated, the preparation of an EIR is not warranted.

COMMENT 9

... Consider the following examples illustrating the difficulties, which the owners of the industrial properties will experience if the General Plan Amendment is approved:

- In 1996, the Galante Brothers sought a conditional use permit for a concrete/asphalt recycling facility on Barnard Avenue. The property was zoned M4 (Heavy Industrial). However, the City had previously allowed a light industrial use to be established on the M4 parcel next door. That neighbor objected to the Galantes' CUP, contending that the heavy industrial activity would have an adverse effect on its light industrial operation. The City Council denied the Galantes' CUP application on the basis that the proposed use was incompatible with neighboring uses.*
- In the early 1990's, the City approved a residential development at the end of Sierra Road, just east of Coyote Creek and across that Creek from industrial lands. After that project was built, the homeowners sued the City and the developer regarding impacts from the preexisting adjacent industrial uses, and have subsequently been vocally opposed to every new use permit sought for that industrial area.*
- In the mid 1990's, a community center was proposed for industrial land in District 7. The City Council, led by Councilmember Shirakawa, rejected the proposal on the grounds that it would harm the viability of the surrounding industrial uses.*

RESPONSE TO COMMENT 9

The appellant identifies instances in which other industrial uses were either not approved or were opposed by surrounding residents. Staff agrees with the appellant in that introducing a residential use in the predominantly industrial area could have a "limiting effect" on certain types of industrial uses or future industrial development, particularly those uses that might have more potential for nuisance effects and which would be required to obtain a Conditional Use Permit. Such potential, speculative limiting effects would not be considered significant unavoidable physical environmental impacts, but rather potential economic effects of the particular area in question.

COMMENT 10

The fact that the Property is bordered on three sides by industrial lands barely rates a mention in the Mitigated Negative Declaration, beyond (1) the statement on page 10 that any incompatibility will somehow be avoided simply by applying the City's setback requirements to the residential development and (2) the conclusory statement made on page 59 without any

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analysis or factual support that “adherence to the General Plan Policies and the programmed mitigation measures would reduce these impacts to a less than significant level.”

The predictable result of that omission is that there is virtually no analysis of the effects of the Project on the existing industrial development. Only by essentially ignoring the existing environmental setting is the document able to conclude that the Project would not have a significant effect on the environment. Analyzing the Project as though it existed in a vacuum subverts the intent of CEQA and violates their letter of law.

RESPONSE TO COMMENT 10

The Initial Study for the Mitigated Negative Declaration does in fact reference the industrial uses adjacent to the site in the discussion of potential land use impacts. The Initial Study concludes that the introduction of a residential use would not result in a significant unavoidable environmental impact. The discussion goes on to state that a residential project may result in complaints and limitations being placed on the existing industrial uses. Planning staff agrees with the applicant that the introduction of a residential development may result in limitations being placed on the adjacent uses that could preclude some industrial uses from operating in the immediate area. However, the potential operational restriction of some industrial uses in close proximity to the subject site would not be considered in conflict or inconsistent with the City's General Plan policies, nor does it constitute a significant unavoidable environmental impact.

COMMENT 11

An EIR is required whenever substantial evidence in the record supports a “fair argument” that a significant impact may occur. Even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR. (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75.) The “fair argument” standard creates a “low threshold” for requiring preparation of an EIR. (Citizens Action to Serve All Students v. Thornley (1990) 222 Cal.App.3d 748, 754.)

RESPONSE TO COMMENT 11

Planning staff recognizes the importance of the “fair argument” standard under CEQA. However, the subject protest letter does not provide any substantial, direct evidence, supported by facts, that the proposed project would result in a significant environmental impact on adjacent properties. Staff agrees with the appellant in that an approved amendment for a residential land use designation on the subject site could potentially affect the economic development opportunities for some industrial uses in the immediate area. The potential economic prosperity of the surrounding area would not be considered a significant unavoidable environmental impact.

COMMENT 12

Applying CEQA to the proposed General Plan Amendment, it is clear that there is more than a “fair argument” that significant impacts may occur. The potential conflicts between residential use and the industrial uses described above are obvious. Moving a sensitive population into a hazardous material zone area increases the cost of doing business, decrease the desirability of locating there, and may result in de facto rezoning the area.

The project reflects a classic example of “spot zoning.” This single residential structure, surrounded, as it will be by industry on three sides and parkland on the fourth, can never become part of a neighborhood. As a result, the residential development will deteriorate over time due to its proximity to the industrial uses (see the residential development at Senter and Needles for example), just as the industrial uses will be adversely impacted due to their proximity to the residential project.

RESPONSE TO COMMENT 12

A residential land use designation on the site may result in negative effects on the prosperity of the surrounding industrial area and would be inconsistent with the City’s efforts to preserve the area for strictly industrial users. These negative effects would be economic in nature, would be difficult to quantify and would not be considered a significant physical impact on the environment. The appellant’s theory that any future residential project would deteriorate over time is speculative and unsubstantiated by factual evidence and does not necessitate the preparation of an Environmental Impact Report (EIR).

COMMENT 13

The incompatibility, which will be set in motion by approval of the General Plan amendment is a significant impact which is not, and cannot be, addressed in a negative declaration. Nor can the impact on the industrial area of reducing the allowable maximum noise level at the property line from 70 DNL to 55 DNL, or precluding loading which currently commences at 5:00 a.m. pursuant to Section 20.50.220(B). Similarly, the additional regulatory obstacles to the uses of hazardous substances on the industrial properties, which regulations would not exist but for the granting of the General Plan amendment allowing residential adjacent to industrial, also represent a significant environmental impact.

Consequently, it is clear that the project may have significant land use/planning, noise and hazardous materials impacts. This letter articulates a “fair argument” to that end, and is supported by the substantial evidence described above. Under such circumstances, the City has no discretion. The mandatory language of Public Resources Code Section 21080(d) compels the City to prepare and certify an EIR (and adopt the Statement of Overriding Considerations which we believe will be necessary to overcome these unmitigatable environmental impacts) prior to approving a General Plan amendment.

RESPONSE TO COMMENT 13

As indicated in Responses to Comments above, all industrial users are required to conform with all relevant hazardous materials handling and storage regulations. Possible future reductions in area noise levels would not constitute a significant environmental impact under CEQA. The appellant has not identified substantial evidence supported by facts which directly links and/or establishes a chronology of events which will lead to a significant unavoidable physical impact on the environment due to the potential approval of a high density residential project on the subject site. Speculation, fears and/or opinion do not constitute factual evidence of an unavoidable significant physical impact on the environment.

The proposed project is currently requesting to change the General Plan Land Use designation on portions of a 21.7 gross acre site. There is currently no specific development proposed as part of this General Plan amendment. Therefore, appropriate mitigation for potential impacts identified in the Initial Study and Mitigated Negative Declaration would be those General Plan policies directed at protecting sensitive receptors and natural resources from significant environmental impacts. The Initial Study and Mitigated Negative Declaration for the proposed General Plan amendment adequately identify General Plan policies which will be applied to future development of the site. General Plan policies include Urban Design and Residential policies, Hazardous Materials policies and Noise policies. Conformance with these General Plan policies would reduce potentially significant environmental impacts to a less than significant level.

CONCLUSION

The Initial Study prepared for this project examined the potential for significant environmental impacts from the proposed General Plan amendment(s) and concluded that there was no substantial evidence that the proposed land use change would result in a significant unavoidable environmental impact. The protest letter received on the Draft Mitigated Negative Declaration does not include any substantial evidence that this proposed land use change would result in a significant adverse impact on the environment; consequently, the preparation of an EIR is unnecessary.

ALTERNATIVE ACTION

The alternatives available to the Planning Commission at this time are to uphold the Mitigated Negative Declaration for the General Plan Amendment proposal or to require the preparation of an Environmental Impact Report.

STEPHEN M. HAASE, AICP, DIRECTOR
Planning, Building and Code Enforcement

cc: Silicon Valley Advisors, LLC.
Matteoni, Saxe and O'Laughlin, Lawyers